

ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

TUESDAY, SEPTEMBER 23, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS.
Washington, D. C.

The subcommittee met, pursuant to the call of the chairman, at 3 o'clock p. m., in the room of the Committee on Appropriations in the Capitol, Senator Francis E. Warren presiding.

Present, Senators Warren (chairman), Lenroot, and Chamberlain.

STATEMENT OF MAJ. GEN. C. P. SUMMERALL, UNITED STATES ARMY.

Senator WARREN. Gen. Summerall, this subcommittee has before it a bill the object of which is to provide for a revision of the Articles of War and the system of military justice, making a number of changes therein. We have before us the law as it stands, and so far we have the report of one committee which, on the part of the War Department, has been looking the subject over.

We would like to have you state what changes, in your estimation, should be made in the present law, and we would like to hear from you as to the application of the present law abroad as it has come under your control to some extent, and as it has come under your observation.

Gen. SUMMERALL. The present Articles of War were sent to me as well as to other officers, for study, while I was a battalion commander. I was in very close touch with the administration of discipline at that time, and went over them very carefully before they were presented to Congress.

During the war I have had occasion to administer discipline, altogether with combat troops, first a brigade, then a division, and then an army corps.

As far as it came to my observation or experience, the principles of the present Articles of War presented no difficulties and raised no objections in my mind. The only inconvenience experienced was that of applying them to general courts-martial in the case of a combat division that was intensely engaged, or was relieved from the line only for the short period required for replacements, and reentry into the line. We did find considerable trouble in assembling officers for general courts-martial during these short withdrawals, and it required especial energy and effort to dispose of such cases as had accumulated. As far as I know, however, all cases were cleared up during these periods of rest, and I do not recollect any cases where men suffered long periods of confinement without trial or where any unusual hardship was worked upon them in the application of the present Articles of War.

Senator WARREN. Have you noticed the differences between the proposed legislation and the present law?

Gen. SUMMERALL. Yes, sir; I have had the present articles read and followed the new articles, so as to compare them.

Senator WARREN. Perhaps you might give us your opinion as to the adoption of some of those.

Gen. SUMMERALL. There are presented to me certain essential differences in the proposed articles from the existing articles. The first in order is the composition of a court in which it is provided that soldiers are competent to sit on courts-martial. I do not believe such a provision is wise, or that it would produce the results which perhaps are sought. I believe the sentiment is general with officers to secure fair treatment and considerate treatment to our men. In my own experience, there is every desire to minimize the punishment of men, to secure justice, to preserve their confidence in discipline, and to maintain high standards of morale, self-respect, and contentment in a command.

In the first place, I do not think that our enlisted men would be qualified by training or by their duties to sit as members of a court-martial. I doubt if the effect on them or on their associates would be such as to increase the confidence that they would have in a court, or increase their happiness in the command. Like any untried thing, it would be an experiment, and it is my opinion that it would not be a successful experiment.

Senator WARREN. What is your opinion as to the desire of the men themselves, if the matter was put before them whether they should have that duty?

Gen. SUMMERALL. I think a certain class would desire it, but it is my opinion that a great many would be opposed to it. Discipline is something that is peculiar to the military service, but it is the very foundation of the military service, and I am of the opinion that we should be very conservative in making radical departures from a system which has been vindicated in many varieties of circumstances. The change might succeed, but I doubt it.

Senator WARREN. There are two propositions, as I understand it—not in that bill, it is true, but yet in that bill in one sense, and in the minds of some people in another.

In the bill itself it is provided that a certain proportion of the members of a court on the trial of enlisted men shall be privates, and in the trial of officers that a certain number of members of the court shall be noncommissioned officers. I understand that others have the idea that in all trials of enlisted men the court should be like a jury in a civil court; that all should be enlisted men. What is your opinion of those two angles of the case?

Gen. SUMMERALL. I think it would be fatal to discipline to have a court composed entirely of enlisted men.

Senator CHAMBERLAIN. This bill does not propose that, Senator, you know.

Senator WARREN. Yes, I understand that; but that has been proposed by others. This bill proposes that in the trial of enlisted men a certain number of members of the court shall be enlisted men; and the General has already stated, or at least I so understand him, that of the two alternatives he would prefer a court composed partly of enlisted men rather than one composed altogether of enlisted men.

Your opinion is, General, that a court should not be composed wholly of enlisted men?

Gen. SUMMERALL. It would be fatal to discipline.

Senator WARREN. To have any portion of it so composed?

Gen. SUMMERALL. I would not say to have any portion of it so composed; but to have a court composed altogether of enlisted men would be fatal to discipline. To have a court composed partly of enlisted men would be less injurious. The proportion here recommended might not have any effect upon the procedure at all.

Senator WARREN. How large do you feel that the proportion of enlisted men could be safely made? Or should such a change be made at all?

Gen. SUMMERALL. I do not think it would do any good, sir. I prefer the present Articles of War to those proposed, with respect to the composition and appointment of courts-martial.

Senator CHAMBERLAIN. What article is that?

Gen. SUMMERALL. I refer to articles 4, 5, 6, 7, 8, 9, 10, and 11.

The next radical change is as to the judge advocate, in article 12. As I understand the proposal, it virtually converts the court into a jury and the judge advocate into a presiding judge. The judge advocate may or may not be an officer; but, at any rate, he would probably not be an officer responsible for the discipline of the command. I believe the soldiers receive more sympathy and more leniency from officers who are associated with them than from officers who are not so associated. I believe that a court-martial will arrive at a decision which is better for the service than will the most expert judge. I believe it is a good deal safer to intrust a case to a court-martial as at present constituted, and a good deal surer for the preservation of discipline and contentment in a command, than it is to transfer the administration of justice in the Army to single individuals in each case, however well informed they may be in the law.

I believe the result would be a greater number of convictions than are secured by a court-martial, with no appreciable difference in the application of the law to other cases.

If the administration of military discipline is taken away from the officers who are responsible for the training and the employment in combat of the troops, I believe it will have an adverse effect upon the morale and upon the discipline of the Army.

I do not consider that the administration of justice is parallel to the treatment of the sick and wounded, for example.

There is no doubt that we need more law in our courts, but I believe this is a difficulty which can be overcome by giving more attention to the study of law, or to supplying more liberally officers to act as judge advocates of courts-martial as now constituted.

Senator CHAMBERLAIN. You notice that that section does not undertake to take away from the military authorities the discipline, but simply deprives the judge advocate of the function of either a prosecutor or a defender, and leaves him simply as an adviser to the military court. He does not become a member of the court. He has nothing to do except to advise.

Gen. SUMMERALL. As I understand it, he organizes the court, rules upon all questions of law including challenges and questions touching the competency and impartiality of the court, advises the court and the convening authority, and so on.

Senator CHAMBERLAIN. That is along the lines of the British system, where the judge advocate is really a representative of the judge advocate general of the realm.

Gen. SUMMERALL. Yes, sir.

Senator CHAMBERLAIN. He sits as a legal adviser of the trial court, and the court is appointed by the commanding officer, just as before; and if you will notice, it provides that the judge advocate shall not be a member of the court, but shall sit with the court

all the time that it is in open session, and shall fairly, impartially, and in a judicial manner perform the following duties and such others not inconsistent herewith as may be described by the President in virtue of article 41.

Gen. SUMMERALL. Yes.

Senator CHAMBERLAIN. Then it prescribes his duties under several subdivisions.

Gen. SUMMERALL. They are the ones that I referred to, where it seemed to me he virtually became a presiding judge.

Senator CHAMBERLAIN. Do you see any objection to a judge advocate sitting with the court, not being a member of the court, but advising the court rather than acting as a prosecutor or a defender, simply to see that the law and rules of evidence are complied with in the admission of testimony?

Gen. SUMMERALL. Those duties should be performed. I see no reason for making him an additional adviser, if the judge advocate of the court is competent, or if he became himself our present judge advocate.

In that connection I would add also that I would deplore very greatly the detail of an officer as prosecutor. I think the term itself, and what it implies, would be very objectionable in the military service.

Senator CHAMBERLAIN. Is not that what the judge advocate is now?

Gen. SUMMERALL. He is required to conduct the case, and to see that justice is done the accused. He brings out all the evidence. As a matter of fact, the first part of his duty is to bring out and develop the prosecution; but he is there to endeavor to see that the whole case is presented, and that justice is done.

Senator CHAMBERLAIN. Then why is a man ever appointed to defend a man who is on trial?

Gen. SUMMERALL. It is a concession to the defense. I do not consider that it should be necessary, if the judge advocate is really performing his duties, to have a counsel for the defense; but it is a consideration which is properly and habitually extended to the accused.

Senator CHAMBERLAIN. In accordance with the theory, under the old English system, the prosecuting attorney protected the interests of the defendant as well as the interests of the government. But he gradually drifted into the category of the man who prosecuted.

Gen. SUMMERALL. Yes.

Senator CHAMBERLAIN. Then the judge advocate, in all these prosecutions of the Army, really became an advocate for the cause of the Government.

Gen. SUMMERALL. He is to be an advocate for the cause of the Government, but he would also look out for the interests of the

accused. That is his duty. Where there is counsel for the accused, that would naturally go to the counsel.

Senator CHAMBERLAIN. Does he, as a matter of fact, protect the interests of the defendant in a criminal case? Is he not rather a prosecutor than one who acts as an impartial judge between the Government and the prisoner?

Gen. SUMMERALL. I can not say that he is, Mr. Senator. I have been a judge advocate a great many times; and I have been on courts a great deal. Where there is a counsel, that counsel is expected to do everything he can to present the case of the accused, and the judge advocate protects the case of the Government.

Where there is no counsel, the judge advocate should present the case of the accused with the same sincerity and thoroughness as he presents the case of the Government. As a matter of fact, in nearly all cases the accused has a counsel who does that for him, and it is better that he should do it in that way. I think it is desirable for the accused to have a counsel; but I do not like the idea of an officer being appointed to prosecute a soldier or a person in the military service.

Senator CHAMBERLAIN. That is the real objection that I have to the present system of administering the law by the judge advocate. He becomes really a partisan for the Government; not intentionally, perhaps, but in the very human side of it.

Gen. SUMMERALL. I have no doubt that he does at times.

Senator CHAMBERLAIN. Yes; the records that I have show that in every case; that he really has drifted into the position that the district attorney in a civil tribunal occupies, looking more particularly after the interests of the side that the Government is espousing.

Senator WARREN. General, you were asked by Senator Chamberlain as to the British military system. If, when you have finished your other remarks, you feel like doing so, I should like to have you compare with our own the real effect in action of the British courts in combat regions; tell us how nearly they agree, and which you consider the more effective. Of course I understand that you do not want to give any evidence that would seem to attack the British system in any way; but we should like to have your opinion, before you get through.

Gen. SUMMERALL. I will answer, right here, that I am not familiar with the British administration of justice, but I gathered from conversations that we are very much milder in the administration of military justice in the field than was the British Army.

Senator WARREN. In that connection, there have been complaints that have come before the committee, quite in detail and in considerable number, against the severity of sentences of our military courts. Now, you represent more directly than anyone who has been before this committee the combat section of the Army, and if you have become acquainted with the way that courts have been conducted in this country preparatory to going to the other side, and how that conduct may compare with the conduct of courts over there, we shall be glad to hear from you on that angle of the case.

Gen. SUMMERALL. I feel sure that there never was any reason to complain of severity of sentences in the combat units with which I had to deal. On the contrary, the entire sympathy of officers is with their soldiers in combat troops. The evildoer is punished, but

the whole sentiment is merely to vindicate discipline and preserve standards which will insure success in combat, and it has not been infrequent for an officer to express great regret that he was compelled to prefer charges.

The sentences of the courts coming before me were comparatively light; and yet I believe they maintained a high order of discipline.

Senator CHAMBERLAIN. How did they get to you? You commanded a division?

Gen. SUMMERALL. I commanded a division and a corps. In the corps I convened the courts for the corps troops. In the division I convened the general courts for the division.

Senator CHAMBERLAIN. Were you connected with the Judge Advocate General's Department?

Gen. SUMMERALL. No, sir; I had a judge advocate.

Senator CHAMBERLAIN. Did the sentences that were imposed by the special courts and by all the courts-martial come to your attention?

Gen. SUMMERALL. Only those that I convened.

Senator CHAMBERLAIN. Did they come back to you?

Gen. SUMMERALL. They came to me, personally.

Senator CHAMBERLAIN. All of them?

Gen. SUMMERALL. Those that I convened, the division courts, and the corps courts.

Senator CHAMBERLAIN. The division courts and the corps courts?

Gen. SUMMERALL. Yes.

Senator WARREN. General, I think that the wish of this subcommittee is to get every scrap of opinion that you men who have been over there have to express on these matters, and while I have led you astray, somewhat, I hope you will give us any suggestions that you have, even if we do not ask the appropriate questions to bring them out.

Gen. SUMMERALL. Senator Chamberlain has just asked me with regard to these cases that came to me. You, of course, are familiar with the convening authority's procedure in a court-martial case. Every division and every corps had a judge advocate who was a professional lawyer. Both of mine were practicing lawyers in civil life, and I considered them as very expert. They reviewed the cases and presented them to me, pointing out errors for correction, or anything that required my special attention. I did give them my personal attention, and was generally guided, as I think most officers are, by the views and opinions of these men who have superior legal knowledge.

Senator CHAMBERLAIN. None of the summary court cases came to you?

Gen. SUMMERALL. Yes; my own summary court cases.

Senator CHAMBERLAIN. And did the regimental court cases come to you?

Gen. SUMMERALL. No, sir.

Senator CHAMBERLAIN. Did the brigade court cases come to you?

Gen. SUMMERALL. No, sir; each one went to its own headquarters.

Senator CHAMBERLAIN. So that there really came to you only the cases which were tried by divisional courts-martial and corps courts-martial?

Gen. SUMMERALL. Yes.

Senator CHAMBERLAIN. What classes of cases did that involve?

Gen. SUMMERALL. Absence without leave during action, once; an officer giving liquor to a soldier and making him drunk, and while he was drunk wrecking a car, hurting individuals, and completely destroying a very valuable automobile. Those are two that I recall. There were cases involving offenses like that.

Senator CHAMBERLAIN. On the part of officers?

Gen. SUMMERALL. On the part of officers and soldiers. I recall only one officer being tried. The cases were generally those of soldiers.

Senator CHAMBERLAIN. Can you state how many cases you reviewed while you were a divisional commander?

Gen. SUMMERALL. I can not. The cases, taking both divisional and corps, would make a very small number.

Senator CHAMBERLAIN. As compared with regimental and lower commanders, the number would be very small?

Gen. SUMMERALL. Yes. As a brigade commander I had a number of summary court-martial cases to act upon; and then there were some summary courts of the division and corps headquarters, too. But the total number was never very large, because we did not have any large number of trials.

Senator CHAMBERLAIN. Could you approximate the number of cases that came to you for approval or disapproval as division commander or as corps commander?

Gen. SUMMERALL. No, sir; I could not.

Senator CHAMBERLAIN. Your functions there would be to approve or disapprove, as the officer who appointed the court?

Gen. SUMMERALL. Yes; or to do any of the other things that the reviewing authority has the power to do, under the law.

Senator CHAMBERLAIN. Can you give any idea how many sentences you disapproved, and your recommendations in those cases?

Gen. SUMMERALL. No; but it would be very few; not over two or three, perhaps.

Senator CHAMBERLAIN. Do you remember ever sending a case back after a party had been acquitted by a general court-martial, and directing a reconvening of the court?

Gen. SUMMERALL. I do not think I ever did that, sir.

Senator CHAMBERLAIN. I am glad to know that, General. I think that is the most un-American part of the whole system.

Gen. SUMMERALL. Yes; I think so.

Senator CHAMBERLAIN. And it subsequently led the President, I think, to issue a general order to forbid that course—convicting a man after he had been acquitted by a court.

Gen. SUMMERALL. Yes.

Senator CHAMBERLAIN. The number of cases was very much larger which came up to a regimental commander?

Gen. SUMMERALL. Undoubtedly.

Senator CHAMBERLAIN. And the captain of a company appointed a court too, did he not?

Gen. SUMMERALL. I think not, sir. I do not think we ever had any companies isolated enough for that. They were always with the regiments.

Senator CHAMBERLAIN. So that was probably the lowest appointing commander?

Gen. SUMMERALL. The regimental commander was probably the lowest appointing commander.

Senator CHAMBERLAIN. Have you any idea how many sentences went up to the regimental commanders in your division for approval or disapproval?

Gen. SUMMERALL. No; I would not know that, sir.

Senator CHAMBERLAIN. You could not, therefore, tell how many cases were approved or how many disapproved?

Gen. SUMMERALL. No, sir.

Senator CHAMBERLAIN. You, of course from the very nature of your duties, could not examine into any other cases than those which came to you from divisional courts or corps courts?

Gen. SUMMERALL. No, sir.

Senator WARREN. You were in command of a brigade for a time. Was your experience there of any importance to consider with the other?

Gen. SUMMERALL. Only for the summary court, appointed by the brigade commander. As brigade, division, and corps commander I had summary courts for minor offenses, and very light punishments.

Senator CHAMBERLAIN. Shall I ask him a few questions, Mr. Chairman, or am I interrupting you?

Senator WARREN. No; not at all. There is no need that there should be continuity on either side, I think. We do not embarrass you by breaking in occasionally, General?

Gen. SUMMERALL. No, sir.

Senator CHAMBERLAIN. I would not like to interfere with any course that you have mapped out.

Under the construction placed upon the act, or rather under the law, section 1199 of the Revised Statutes of the United States—

Gen. SUMMERALL. Yes.

Senator CHAMBERLAIN (continuing). The Judge Advocate General has no power other than to review a case that comes to him, and to send it back to the commanding officer with advice only. Assuming that the court had jurisdiction to try the case and that the proceedings were regular, the Judge Advocate General says that he has no power to reverse, modify, or review a sentence. Do you not think that there should be, somewhere, this power of examining a case and reversing or modifying it?

Gen. SUMMERALL. Yes; I think that would be a very good thing. I think it should be vested in the Military Establishment, somewhere—in the higher authority.

Senator CHAMBERLAIN. There seems to be a consensus of opinion everywhere that there ought to be somewhere this reviewing authority and this power to reverse or to modify or to change a sentence. Even the American Bar Association committee, the majority of that committee, recommend something of that kind; but they recommend the suggestion which the Judge Advocate General has made, that that final reviewing authority should be in the Commander in Chief. The minority committee of the American Bar Association recommend rather along the line of the British system. The Kernan report recommends some reviewing authority, but the Judge Advocate General has held that he had no such reviewing or revisory authority. You think that it ought to exist?

Gen. SUMMERALL. Oh, yes, sir; I do.

Senator CHAMBERLAIN. The great difference between Gen. Ansell and Gen. Crowder is right here: Gen. Crowder insists that he has no revisory power, but only advisory power, while Gen. Ansell insists that under the law as it exists, the Judge Advocate General possesses power not only to revise but to modify or change. Have you ever examined into that?

Gen. SUMMERALL. No, sir; I never have examined it, and I do not think that the Judge Advocate General is the one to exercise that authority except in his capacity as a legal officer of the War Department. I think that the functionary who does that should be a person who exercises command, like the Secretary of War or the President of the United States.

Senator CHAMBERLAIN. Yes; but that leaves it altogether in a military status.

Gen. SUMMERALL. I think it should be. It is an element of command, I think.

Senator CHAMBERLAIN. In the last analysis that would leave the power, then, vested in the Chief of Staff, because he is the legal adviser, or the adviser in matters military, of the Secretary of War, and so of the Commander in Chief.

Gen. SUMMERALL. Except that it would seem to me that the Judge Advocate General of the Army would occupy a similar relation to the Secretary of War or the President that the judge advocate of a division or a corps holds to the commanding officer of that unit.

Senator CHAMBERLAIN. What objection have you to the British system, where the judge advocate general is disassociated from the army—that is, is a civilian—and holds his position for life?

Gen. SUMMERALL. The only purpose of discipline is to maintain troops in a condition for combat. The people who train and maintain them in condition for combat, and who employ them in combat, are the people who exercise command. If the basis of their employment in combat, which is discipline, is taken out of their hands, I do not think that our Army will be in a state fit for combat.

Senator CHAMBERLAIN. Was not the British Army in pretty good fighting condition, so far as discipline was concerned?

Gen. SUMMERALL. They fought well; there is no doubt about that; and they did well. I do not know what their administration of military justice is.

Senator CHAMBERLAIN. Did you ever compare the discipline of that army with ours?

Gen. SUMMERALL. I have been in the British Army and I have seen them. I think they have very good discipline.

Senator CHAMBERLAIN. You spoke about being advised that there was some reviewing authority here somewhere that you approved of.

Gen. SUMMERALL. That is, I approve of the principle.

Senator CHAMBERLAIN. Do you know what that consists of?

Gen. SUMMERALL. No, sir; I do not know what it is.

Senator CHAMBERLAIN. Or who functions in it?

Gen. SUMMERALL. No, sir; I do not know what it consists of.

Senator CHAMBERLAIN. Have you in mind the so-called clemency board?

Gen. SUMMERALL. I think it is called that; yes, sir.

Senator CHAMBERLAIN. That has been established since the armistice.

Gen. SUMMERALL. I do not know its history or its functions.

Senator CHAMBERLAIN. Yes. The difficulty with such a board is here, General: Take a man who has been convicted, say, before a court-martial. There may have been evidence admitted against him which was wholly inadmissible; or there might have been circumstances that were not considered by the court. Now, he is convicted by a military court. He is a criminal in the eyes of the law. There is no appeal for him from that. If his case gets to the Judge Advocate General, and the Judge Advocate General and the clemency board recommend clemency in his behalf, it simply disposes of the unexpired portion of the sentence. There is no way to get rid of the stigma of the conviction. Do you not think that that power ought to be lodged somewhere?

Gen. SUMMERALL. Yes; if a man has been unjustly subjected to the disabilities and disadvantages that go with conviction, he certainly is entitled to restitution.

Senator CHAMBERLAIN. There is no means under the law, as I understand it, to get rid of it now.

Gen. SUMMERALL. Our whole purpose is to do justice. I think we all want that, and there ought to be some way of accomplishing justice if injustice is done, so far as it is humanly possible.

Senator CHAMBERLAIN. Do you deem the imposition of severe sentences for minor infractions of the law as necessary in order to maintain discipline in the balance of the Army?

Gen. SUMMERALL. No, sir. On the contrary, I think that the only purpose of punishment is to vindicate discipline; to have it exercise a deterrent effect.

Senator CHAMBERLAIN. As to the individual or as to the mass of the Army?

Gen. SUMMERALL. As to the mass; and as to the individual, too, as a part of the mass.

Senator CHAMBERLAIN. The degree of an offense in the military service is bound to vary with the conditions under which the offense is committed. An absence without leave at a military post now, around Washington, for a day, say, would be a very minor infraction; but there are other conditions where it would become a very serious offense, in war. In the face of the enemy, for example.

Gen. SUMMERALL. In the face of the enemy, yes, sir. And yet that man might have had no intention of deserting or of evading his part in the fight; he is not a coward, but he takes it into his head to go away and see his brother in another command. Yet he subjects himself to very severe punishment; so that in the military service we are compelled to differentiate degrees of the same offense, and we have got to consider from a military viewpoint, in the interests of the service and of the country, the conditions under which the offense was committed as well as the offense itself. In any case the punishment, of course, should not be any more severe than is necessary to vindicate discipline and to act as a deterrent.

Senator CHAMBERLAIN. Then you do not believe in the doctrine of imposing sentences *in terrorem*, to frighten the balance of the army? That is, if a man was guilty of a minor infraction of the law, to impose a heavy sentence against that individual in order to terrorize the balance of the army against the commission of the same offense?

Gen. SUMMERALL. No; that is not my conception of discipline, at all. You do not impose these things to terrorize people, but in order to bring to their minds the gravity of them so that they will see that the offenses are so serious that they must not be committed; and the punishment should be a punishment intended to be served as commensurate with the offense itself.

Senator CHAMBERLAIN. What would you say about sentences imposed here by the Army in training, in the United States, of 10, 15, 25, and 50 years for absence without leave? Can you conceive of those offenses being grave enough to require such a sentence?

Gen. SUMMERALL. That is a new idea to me, sir. I would not have thought of such sentences.

Senator CHAMBERLAIN. I do not think you would, General; but that condition has prevailed. There are cases where long-term sentences have been imposed for absence without leave for a few days, and sometimes a very heavy sentence had been imposed against a man where a lighter sentence was imposed against another for some time of absence without leave.

Gen. SUMMERALL. Those inequalities are bound to result, within limits, I think, under any system; but their differences should not be so great as to work a marked injustice on the men who suffer the more severe punishment.

Senator CHAMBERLAIN. Did you ever see a case where a court imposed a heavy sentence against a man with the feeling that it would not be served; that leniency would be exercised?

Gen. SUMMERALL. Only where that sentence was mandatory. Only where the court considered it its duty to impose a sentence proportionate to the offense committed, although there may have been extenuating circumstances in the commission of the offense. That is the exceptional case, but I believe it has happened.

Senator CHAMBERLAIN. Speaking of letting enlisted men compose a part of courts under the court-martial system, you think it would not be wise to do that?

Gen. SUMMERALL. I think it is unwise, Senator.

Senator CHAMBERLAIN. Do you think it would be unwise if the judge advocate who attended the trial was not a member of the court, was not the prosecutor representing the Government, nor was he representing the defendant, but simply acting as the legal adviser, being there to steer the court, composed of commissioned officers and enlisted men, along the right legal course? Do you not think that the enlisted man could serve there under such instructions and guidance and leadership just as well as he could serve on a jury?

Gen. SUMMERALL. He could be guided by this adviser just the same as any other members of the court. But I am of the opinion that there are many things which will arise, in which he would not be as qualified to act as the officers.

I am of the opinion that he could be advised, and could be benefited just as any officer by the advice, but I do not think that the effect on the administration of justice would be in any way improved, and I do think that it would tend to a lessening of the efficiency of a court.

Senator CHAMBERLAIN. There was some testimony before the American Bar Association Committee that wherever sergeants were placed on a court, their disposition was to impose severer sentences on the enlisted men.

Gen. SUMMERALL. I want to admit that in my statement. There is no doubt about it. There is no doubt about it, Senator; because I have the highest opinion of and the best relations with my soldiers, but I do not think that they belong on a court-martial.

Senator WARREN. Will you state your opinion as to what would be the result, General; whether it would result in less severity or greater severity?

Gen. SUMMERALL. I think it would result in greater severity.

Senator CHAMBERLAIN. General, pursuing that thought a little further with reference to having the judge advocate disconnected with the court but simply sitting as a legal adviser of the court: One of the things that developed before the American Bar Association Committee—and I think it has developed before this committee—is where a prisoner is being defended by an officer of lesser rank acting as counsel, that counsel being called upon to cross-examine a superior officer on the stand, he was forbidden by the officer to cross-examine him touching questions affecting his veracity.

Gen. SUMMERALL. I think that would be a very exceptional thing. I never have experienced it, and certainly would not have allowed it on a court. Counsel has full right to perform all of his duties regardless of relative rank.

Senator CHAMBERLAIN. It ought to be so.

Gen. SUMMERALL. It is so, sir.

Senator CHAMBERLAIN. That is the only case I know of, that one case.

Gen. SUMMERALL. Yes, sir. I dare say there have been exceptional cases where almost every kind of abuse could be pointed out, but in the great mass of cases we tried, I believe that the intention and the practice was to secure a fair and impartial trial, and justice, with consideration to the person being tried.

Senator CHAMBERLAIN. Do you have in mind many cases where the commanding officer, the officer who appointed the court, sent cases back with instructions to the court to reconvene and convict?

Gen. SUMMERALL. I do not recall any such case, Senator. It may have been, but I recall none. The reverse is correct.

Senator CHAMBERLAIN. That is, to reduce the sentence?

Gen. SUMMERALL. Well, to reconsider the findings with reference to certain points. It might also carry a change in the sentence.

Senator CHAMBERLAIN. Mr. Chairman, I interrupted Gen. Summerall. He was calling attention to the changes in the Articles of War, and I got off on another branch of the subject, here.

Senator WARREN. We shall allow him to proceed in his own way. I should like to get a little more emphasis upon one point. I understand from the general that he believes an enlisted man, no matter whether he is a private or a noncommissioned officer, in performing his duties before a court as attorney, we shall say, for the accused, has the same respect and attention as if he had a commission?

Gen. SUMMERALL. Yes, sir.

Senator WARREN. Then if, in the examination of witnesses before courts on matters on which they might have had personal complaint, it seemed to this committee to be proven that in some cases there had been a rather continuous effort to cut them out, you would think it was more because of the personal nature of the man than because of the fact that he held a subordinate position, would you?

Gen. SUMMERALL. Yes, sir. Such action is wholly inconsistent with the status or the duties of the members of a court, to restrain counsel or restrict him in any proper line of action, and it should subject a court to very serious censure on the part of the reviewing authority.

Senator WARREN. As to leniency, the particular points that the witness has brought up are the differences on mooted questions, one as to the service of enlisted men on courts-martial, and another, that of having a final court outside of the military.

Senator LENROOT. A military court of appeals.

Senator WARREN. And some other matters. I would like to have you, if you will—because Senator Lenroot was out of the room at the time and I fear he may not have time to read this record—repeat what you said about a court to appeal to as a matter of final appeal.

Gen. SUMMERALL. I said that there should be a power of review, and that it was very desirable in my opinion that it should be vested in some element of the military command; that nothing connected with our courts-martial should be taken away from the command which is responsible for the training and the employment of the troops in combat; that instead of putting it in the hands of the Judge Advocate General, it is my opinion that it should be vested in the Secretary of War or the President; and that I should assume that the relation of the Judge Advocate General to the Secretary or to the President would correspond to the relation of a judge advocate at a division or corps headquarters or an Army headquarters to the division, corps, or Army commander.

Senator CHAMBERLAIN. But the difficulty of that proposition, General, lies here: There have been over three hundred thousand court-martial cases between the time we went into the war and the time of the armistice, and it would be a physical impossibility for either the Secretary of War or the President to review these cases.

Gen. SUMMERALL. Yes, sir; and that would apply to this court, I think, that is mentioned here, also. I calculated it would have had something over 50 cases a day. It would be necessary to empower certain commanding officers or the commander in chief of the Army in the field to carry out this function. I think, with the army in France, it is probable that justice was arrived at within all human possibility by the method that was followed there.

Senator CHAMBERLAIN. Did the Judge Advocate General with the American Expeditionary Forces over there undertake to review and reverse and modify the decisions of the several courts-martial, from corps courts down to regimental courts?

Gen. SUMMERALL. I think that general court-martial cases were reviewed.

Senator CHAMBERLAIN. When you say "reviewed" do you mean reviewed, reversed, or modified?

Gen. SUMMERALL. They approved or disapproved a great many.

Senator CHAMBERLAIN. I think if our Judge Advocate General had exercised the same authority and had placed the same construction on the law, this bill would not have been proposed.

Gen. SUMMERALL. I think you will find that he disapproved a great many of them.

Senator LENROOT. In case of disapproval, then what happened over there with the case?

Gen. SUMMERALL. Well, I presume the man was restored to liberty.

Senator LENROOT. Then do I understand you to say that the commanding officer exercised the jurisdiction to set aside the verdict of a court-martial?

Gen. SUMMERALL. That is my understanding.

Senator CHAMBERLAIN. May it not be that you are mistaken about that, for this reason: I understand that the cases, the sentences of general courts-martial, all came through military channels to the Judge Advocate General here, and he was the man who reviewed them.

Gen. SUMMERALL. I think you will find that they were first reviewed at the headquarters of the A. E. F.

Senator CHAMBERLAIN. I hope that you are right about it.

Gen. SUMMERALL. You will find that from the Judge Advocate General of the A. E. F.

Senator CHAMBERLAIN. Who was that officer?

Gen. SUMMERALL. Gen. Bethel.

Senator WARREN. We will have him before us later.

Gen. SUMMERALL. Yes.

Senator WARREN. He is one of those we expect to hear to-morrow or next day.

Senator CHAMBERLAIN. Yes. I hope that is true. That is not my understanding about it. I hope that he assumed that right.

Senator LENROOT. I do not want to ask the general to repeat anything that he has said, that has already gone into the record, but if you have not stated it I would like to have you go into what way you think a military court of appeals would impair efficiency.

Gen. SUMMERALL. On the contrary, I think it would increase efficiency.

Senator LENROOT. I mean such a court as you object to.

Gen. SUMMERALL. My main objection is that the court constitutes no part of our chain of command, and I believe that any part of its functions should be an element of command because command is responsible for the employment of troops in combat, and I do not believe we ought to divorce our discipline, which is all that courts-martial are intended to accomplish, from the element of command.

Senator LENROOT. In saying that, do you assume that the court of military appeals would attempt to substitute its judgment for the judgment of the court-martial upon the facts, and in that way interfere with discipline, or do you have in mind that such a court would only undertake to exercise jurisdiction where prejudicial error had been committed by the court-martial.

Gen. SUMMERALL. It is rather difficult to say how the facts would be affected. We must assume that they would attempt to make the same judgment as to facts as the court itself made, although we receive different impressions from reading things from what we do when we hear them stated. I think the main difference would probably lie in the degree of punishment inflicted.

Senator LENROOT. Suppose this court is given no jurisdiction whatever to pass upon the facts other than to ascertain whether there was any evidence on which the court-martial might exercise its judgment, but that it would have no power to substitute its judgment as to the correctness of the finding of a court-martial upon the evidence

as distinguished from the court-martial review as to whether the court-martial had actually committed prejudicial error in the conduct of the case?

Gen. SUMMERALL. If it was confined merely to the correction of error, there could be no objection to it.

Senator CHAMBERLAIN. That is the point I wanted.

Gen. SUMMERALL. But I understood its functions were very much more.

Senator CHAMBERLAIN. No, that is it.

Gen. SUMMERALL. If it is confined to the correction of error of law, there should be no possible objections to it. On the contrary, it would be a very desirable institution, because we want to do justice, and if injustice is done we all want to correct it. I think that no people are so sympathetic with the soldier as the officers who serve with him—certainly in action, in combat—and far from wanting to do him an injustice, they are the ones who are the keenest to see that he gets justice, and leniency, even.

Senator CHAMBERLAIN. Whether the appellate tribunal is within the military establishment or whether it is composed of civilians, there ought to be a greater power of review than is now exercised by the appellate power?

Gen. SUMMERALL. I think so, sir.

Senator CHAMBERLAIN. Because Gen. Crowder and those who stand with him insist that they have no appellate power; that they have no other right than simply to review a case; and that if the court had jurisdiction and the proceedings were regular, that ends it with them. But now there may have been prejudicial error, there may have been reasons why the case should be reversed, and yet there is no power to reverse. Do you not think that power should be lodged some place?

Gen. SUMMERALL. I do, indeed, sir.

Senator CHAMBERLAIN. That is my insistence about it, all the time, that there should be some power lodged somewhere to reverse for prejudicial error.

Senator WARREN. Do you find anything else that you want to speak of concerning differences between the present law and the proposed law?

Gen. SUMMERALL. There are a number of minor changes which are relatively unimportant compared to the other issues.

With reference to the investigation prior to the filing of charges, so far as I know, substantially what is required in the bill has been carried out, and I doubt very much if any embodiment in the law will secure a more thorough investigation than is now being made prior to the forwarding of charges. It is proper that they should be investigated and that there should be reasonable grounds for a finding of guilt before charges are sent forward.

I have before spoken of my feeling in regard to a prosecutor. I think there is no objection to an officer being detailed by the convening authority, subject to the convening authority, to assist the court in its functions, and if for any reason a judge advocate should be considered not qualified for that work, he might be an extra officer. But I would very much regret to see an officer detailed specifically to prosecute an enlisted man, in terms and intention. I think the effect

on the morale of the command would be injurious, and I do not believe it is consistent with the spirit in which most officers engage in their duties as judge advocate.

Senator CHAMBERLAIN. That is what I asked you about a while ago.

Gen. SUMMERALL. Yes, sir.

Senator CHAMBERLAIN. It seems to me that the judge advocate who is appointed by the commanding officer has drifted into the attitude of a prosecutor.

Gen. SUMMERALL. Well, he does, many times, undoubtedly; but I still think we ought to preserve, as far as possible, the standard of justice to both sides in the conduct of a case.

Senator CHAMBERLAIN. Could not the judge advocate do that better—carry out your views, which are mine——

Gen. SUMMERALL. Yes.

Senator CHAMBERLAIN (continuing). Could he not carry out those views better if he were simply sitting there, not as a member of the court, not as a prosecutor and not for the defendant, but simply to watch the proceedings and advise the court as well as counsel as to the law of the case?

Gen. SUMMERALL. Yes, perhaps he could; but still, I would not want to call the other man a prosecutor. I would want to call him a judge advocate, or some name that would not imply that he was there to prosecute the soldier.

Senator CHAMBERLAIN. It would not make much difference what you called him.

Gen. SUMMERALL. I think it would, Mr. Senator.

Senator CHAMBERLAIN. You do not want the judge advocate to be a prosecutor, and yet that is what he is. All the records that I have examined show that he is a prosecutor. Now, calling him a judge advocate does not remove the fact that he is a prosecutor.

Gen. SUMMERALL. I would like to encourage and endeavor to instill into the officers the other idea, that they are there to find out the facts and to bring about justice.

I can speak briefly of some of the minor matters here. I do not believe that it should be contemplated that a civilian counsel should be employed by the judge advocate, except in very special cases. I think the terms here are too general.

Senator CHAMBERLAIN. You mean for the defense?

Gen. SUMMERALL. For the defense, yes, sir. I think the terms as to the employment of such counsel are too general, and would result in a civilian counsel—this is at the bottom of page 13 and is part of article 22. I prefer the present system of challenges to that provided in article 23.

I prefer the present oath to that prescribed in article 24.

I think the addition in article 26 is very good to protect the accused from the plea of guilty when he is not guilty.

Article 28 I think is also a very good article.

Article 29 is a good article.

Senator CHAMBERLAIN. That is in the proposed law?

Gen. SUMMERALL. Yes, sir.

Article 34 I think is not desirable, in that there might be a reason why a case should be reopened, and I do not believe any great hardship is worked upon the accused by the time that elapses, generally,

between the finding of the court and the reviewing of the sentence. I prefer the present system.

I do not think we should limit the punishment for contempt as is done in article 25; although punishment for contempt is a very rare thing for a court-martial.

I take it that in article 36, the proportion has been changed to conform to the new compositions proposed in here for a court-martial. I prefer the present court composition and the present ratios for conviction.

The whole question of punishments in articles 47 and 48 and the subsequent articles I believe would be adverse to the interests of the service in many cases. In time of peace I feel that the President is quite qualified to prescribe the limits of punishment, and I believe the limits of punishment prescribed in time of peace have been reasonable and lenient. But in time of war I think it is very dangerous to restrict a court in the punishment, since the offense will vary very greatly with the conditions under which it is committed. With the revisory power vested in higher headquarters, as I think so many have agreed upon, the interests of an accused will be amply safeguarded, and I think it is better not to try to fix the punishment for each offense, as is done in criminal law, but to continue as it now exists.

Senator CHAMBERLAIN. General, do you not think there ought to be a maximum penalty beyond which they ought not to be permitted to go?

Gen. SUMMERALL. Yes; in time of peace. I think that if the punishments laid down here go into effect in time of peace it will result in greatly augmented sentences for offenses, unless the President should intervene and make a lower limit. I think these limits are much too great for times of peace.

On the other hand, in time of war there are many of them that would not be sufficiently great, and for the reasons I have stated before, I believe it will produce more harm in time of peace than it will in war. I think the authority of the President now to fix the limit in peace times is correct, and in war the power that will probably be vested in superior commanders to mitigate and change sentences will protect men from excessive and unjust sentences.

Senator WARREN. You had given an illustration before Senator Lenroot came in, looking, I presume, to the proposition where different grades of punishment were prescribed for two different parties that committed the same offense, only that one might commit the offense in the face of the enemy while the other might commit it entirely away from danger or combat. The General need not go over that again, I suppose.

Senator LENROOT. No; of course not.

Senator CHAMBERLAIN. General, there are men in the Army—and I would place you in that category—who would see that the rights of the enlisted man and also of the noncommissioned officer were safeguarded and perfected; but there are men in higher command who do not do that. They have not the personal touch with the men that induces a man to look after these things. It is out of that state of things that these complaints grow.

Gen. SUMMERALL. I understand, sir, and I am just as anxious as possible to see anything done that will protect from injustice.

Senator CHAMBERLAIN. It seems to me that a properly arranged and organized tribunal will do more than anything else in that direction.

Gen. SUMMERALL. I think it is the greatest relief to be hoped for. As I said in the beginning, if we can increase the number of legal officers in the Army so that we can supply the courts with better legal advice as judge advocates, or in any capacity that Congress sees fit to give them—and I prefer that which is now constituted—we will undoubtedly avoid many of the errors of law that have been committed and complained of.

Now it so happens that the troops I have been dealing with had many lawyers among them, and I believe it was the rule to have good lawyers as judge advocates of courts-martial and judge advocates of the divisions, corps, and armies.

Senator CHAMBERLAIN. That would not be true in time of peace?

Gen. SUMMERALL. In peace times it is not true.

Senator WARREN. Not to the same extent.

Gen. SUMMERALL. But the same severity of punishment would not exist. Punishments are always very light in peace times.

Senator LENROOT. I do not know whether I understood you correctly. I thought you said the President in peace times fixed the limits of punishment.

Gen. SUMMERALL. Yes.

Senator LENROOT. Is that by law?

Gen. SUMMERALL. Yes; the President fixes the limits of punishment.

Senator LENROOT. How do those limits compare with the limits set out in this bill?

Gen. SUMMERALL. I have not compared them, but I think these are very much in excess of his limits; and as I say, it will work, undoubtedly, a hardship on men in peace times, because I think you have intended these to be the limits for war.

Senator LENROOT. Yes.

Senator WARREN. Would the matter you spoke of, the limits of the President, come through regulations from the War Department?

Gen. SUMMERALL. They are probably formulated in the War Department, but they come from the President.

Senator WARREN. You have them?

Gen. SUMMERALL. Yes; and when a case is tried reference is made to the limit for that case.

Senator WARREN. That is fixed by law?

Gen. SUMMERALL. That is within his power.

Senator LENROOT. Are there any other limitations in the regulations themselves further than as to the punishment—as to the punishment in time of war?

Gen. SUMMERALL. No; there are no limitations in time of war.

Senator LENROOT. There are no limitations in time of war?

Gen. SUMMERALL. No.

Senator CHAMBERLAIN. It is entirely in the hands of the court-martial.

Gen. SUMMERALL. Yes; and of the reviewing authority.

Senator CHAMBERLAIN. Of course that is the commanding officer?

Gen. SUMMERALL. The commanding officer that serves with troops.

Senator CHAMBERLAIN. You have served in peace time. Do you not find a great difference between the enlisted personnel now and in the peace-time army?

Gen. SUMMERALL. I do not find the difference to be serious as affecting discipline. The men from our peace-time army that we took into the war were fine soldiers, and in fact they formed the backbone of our force until we got the new men in. The new men poured in and they are also fine men. I have a very high idea of all of our men. They respond, they have high ideas, good morale, and fine traits. I have a very high idea of our peace-time army.

Senator WARREN. Now, you were at article 50, were you not, when you were interrupted, in going through the bill?

Gen. SUMMERALL. I was at article 48. There I began the discussion of the limits of punishment.

Article 49 has very good provisions.

Senator CHAMBERLAIN. That is, the new one?

Gen. SUMMERALL. The new one; yes, sir. But I think that a provision for this review by superior command is necessary rather than have it wait for the President himself. I believe it impracticable to send all these cases to the President.

Senator CHAMBERLAIN. In death sentences?

Gen. SUMMERALL. Yes, sir; and the commander in chief approved a number and executed them. It had to be so. I think you will find that the commander in chief approved and executed a number.

Senator CHAMBERLAIN. There were 10 executions during the war with the Expeditionary Forces, but those cases all came here.

Gen. SUMMERALL. There, again, I was not at the headquarters; but I am only telling what I understood. Gen. Bethel will enlighten you on that, and I think you will find that the commander in chief himself approved death sentences; and I think it is necessary.

Senator CHAMBERLAIN. Well, it may be. That was a matter of regulation. Up to the time of the execution of those Texas negroes, the commanding officer exercised control.

Gen. SUMMERALL. Yes, sir.

Senator CHAMBERLAIN. But after the execution of those men, within 48 hours, there was a general order issued by the commander in chief requiring that before execution such cases should come here.

Gen. SUMMERALL. Article 50, "Mitigation and remission," does not deal with the loss of files. I have read that rather hurriedly, and on the whole I prefer our present system, that which was in use in this country.

Article 52 contemplates the reviewing in the War Department of general courts-martial cases and is virtually mandatory, because I think that no accused would request that his case be not reviewed.

I do not believe it is possible for one board of three men to review the cases that would arise in war. But aside from all that, I believe as I stated before that unless this decision is confined to questions of law it should be vested in the element of command. But I do not believe it should be confined to law. I think it should have power to approve, disapprove, mitigate, and reverse, and do all those things that a reviewing authority can do. By vesting it in the War Department a number of persons could be assigned to the work, and

the decision made by the Secretary or the President, as is done by a division or a corps commander.

Senator LENROOT. Let me ask you right there, General, with reference to the competency of the same man or men, who might be entirely competent to pass judgment, from a military standpoint, upon a fact and mitigation, and so forth, but would not be competent to pass upon prejudicial error of law.

Gen. SUMMERALL. Yes, it would require people who understood the law.

Senator LENROOT. Then if this reviewing authority were confined to the command would you say that there would be that review by competent authority of errors of law?

Gen. SUMMERALL. It would be necessary to install a considerable number of officers in some part of the War Department for this work. It would take a very considerable number of officers and they would have to be fairly competent in the law. But the principal is sound, and it is a matter of arriving at some working basis upon a very great scale.

With reference to the punitive articles they are practically the same as those that now exist, and my only objection there is the placing of the limit of punishment for each article; and I will state again that I believe the effect would be to greatly increase the punishment in time of peace and to unduly restrict the administration of discipline in time of war.

Senator CHAMBERLAIN. In my opinion it is better to punish a man who is actually guilty, and whom a properly constituted appellate tribunal had said had had a fair trial and was guilty—it is better to punish him with a 10 year sentence than to punish an innocent man or a man who has not had a fair trial with a one-year sentence.

Gen. SUMMERALL. Yes.

Senator CHAMBERLAIN. This is, the appellate tribunal should see that every man has a fair deal.

Gen. SUMMERALL. Yes. The principal is sound, but it is a question of arriving at a working basis for it, and I do not believe the court here constituted could handle the cases.

Senator CHAMBERLAIN. The judge advocate general is the revisory power under the law now. He does not attempt to do it all himself.

Gen. SUMMERALL. That is true, and in principle I think the decision should be in the name of some element of command, like the Secretary of War or the President. The effect on the Army is better. We have to consider the effect on the Army, the confidence that the Army has in the agencies created, and the effect on morale of everything we do in the matter of discipline.

Senator LENROOT. Under the bill proposed, General, do you think there would be a review in practically all cases?

Gen. SUMMERALL. I do not think any soldier would ask not to have his case reviewed. I should advise every man to have his case reviewed.

Senator CHAMBERLAIN. Where it involved a conviction practically of a felony.

Gen. SUMMERALL. I should insist that whatever could be reviewed should be reviewed if the law gives the right. I think that the accused should have everything that the law allows him. I should discourage in every way requests not to have those cases reviewed.

I do not think I have anything more of material bearing, Mr. Senator.

Senator CHAMBERLAIN. Mr. Chairman, may I put in the record the letter of Mr. Gardiner? You remember I tried to get him to come down, but he could not get here very well, and he wrote Mr. Wadsworth a letter giving his views on the subject of courts martial. May I have that put in the record?

The Chairman. Yes. That is all right.

(The letter referred to is as follows).

NEW YORK, September 11, 1919.

HON. JAMES W. WADSWORTH, JR.,
United States Senate, Washington, D. C.

DEAR SIR: In response to your telegraphic invitation, I have the honor to submit to your committee, the following comments on the Senate bill relating to military justice.

I am somewhat familiar with the administration of military justice, having graduated from West Point, and having served three years at the Military Academy as an Instructor in law.

I would say at the outset that I regard the criticism of the existing system, more as a symptom than as a disease itself. The disease is seated much more deeply and is much more malignant than the mere matter of court-martial reform would indicate. The thing that is basically wrong, in my opinion, is the extreme distinction that prevails in the Army between the enlisted man and the officer. This distinction is practically the same as was drawn in feudal times between the serf and the overlord. I do not think that this is an extreme view; when an American Army was first formed, in prerevolutionary times, it adopted in entirety the code, the traditions, the customs and the laws that prevailed in England at that time. We did even worse than this; one of the first instructors or drillmasters in Washington's army was Von Steuben. Von Steuben was a German with all of the German ideals of military caste and military discipline, and it is a strange fact that there has been but little change in ideas in this country during the hundred and fifty years which have elapsed since that time. The whole idea might be called the cult of the shoulder strap. It is practiced at West Point in an extreme degree, and West Point has set the standard for the Army in this, as in other respects.

We must remember that it has not been many years since there were but relatively few officers in the Army who were not West Point men, and it is the ideas, traditions, and customs handed down by these men that have fixed the Army standard. The result has been the perpetuation of an entirely false idea of the relation that should exist between enlisted man and officer. We need go no further than to state that at West Point the nickname or cadet name for an enlisted man is "bum"; at least so he was known in my time at the Academy and I presume is so known yet. Because of the kingly origin of our military conception, we have come to regard military discipline as resting very largely on fear, and the club which engenders this fear is the court-martial. That this is true is shown by the testimony of Maj. Gen. Glenn, before a committee of the American Bar Association, sitting in Washington last spring, and the testimony of Maj. Gen. O'Ryan, given but recently, I think before your committee, whereas discipline should be the discipline of leadership, both of these distinguished officers have pleaded for a discipline based on terrorism or fear. The fallacy of this becomes immediately evident when we realize that if a man is kept within bounds only through fear, he will pass without bounds, the minute the thing that causes fear is removed. In other words, if Gens. O'Ryan and Glenn have the correct idea of discipline, that an American soldier is not to be trusted, except under the immediate supervision of an officer, that in spite of the testimony of these distinguished gentlemen, it is nevertheless true that the least number of court-martials is found in the best disciplined command. It is my opinion that there is an important piece of work to be done by your committee at West Point, and the worship of the shoulder strap at that place be destroyed, before the evil of the court-martial system can be entirely corrected.

To take up specifically the matter of court-martial, the specific failure of the army to do substantial justice to the man in the ranks, is due almost entirely to the failure of the Army to appreciate and apply the meaning of the decision of the Supreme Court of the United States in what is known as the Grafton case. Previous to this decision of the Supreme Court, an army court-martial was regarded as an executive agency, and as an executive agency was entirely within the control of the executive

representative, who was the commanding officer. It was not regarded as a court of law at all. In the Grafton case, however, the Supreme Court decided that the court-martial was not an executive agency but was a congressional agency, and placed it on exactly the same footing, in this respect, with other courts created by Congress. The application of this principle, however, the Regular Army has always resisted, and they have resented any attempt which has been made to divest them of supreme power, even of the power of life and death, over the men under them. The result is that up to the present time, a commanding officer, by virtue of his position of command, exercises an almost unrestrained discretion, in deciding who shall be tried, the legal sufficiency of the charge, the legal sufficiency of the proof, the composition of the court, and all questions of law that arise during the progress of the trial. He falls but little short in fact of being judge, jury and lord high executioner, all in one. Thus questions of pure law are decided solely by the power of military command. In other words, we have in our court-martial system that very failing which is most positively antithetical to every principle of American Government. A so-called legal system, controlled entirely by men and not by law. It has been my understanding that it is this very thing that we sent our men to Europe to kill and destroy, and it is not a little painful to find that having destroyed it in Europe, there are many who would still retain it in America.

There are a few points in connection with this proposed bill that, from such experience as I have had, I am not entirely in accord with. I do not think that general courts, or in fact any courts, should contain enlisted men. As courts-martial are at present organized, junior officers are frequently, if not invariably, influenced by the opinion of their seniors on the court. This condition would be much aggravated if enlisted men, whether privates or noncommissioned officers, were to sit in such capacity. Moreover, such a step leans toward running one department of the Army to a soviet, and is, therefore, drawing too close to Bolshevism. It is my opinion that if through a proper legal code, adopted by Congress, wise restrictions are thrown around the power of military command, in its administration of military justice, there will be no need for such a radical and questionable change in the Constitution of the court. I think, therefore, that in this particular the bill goes too far.

In the matter of counsel, it has, of course, most frequently occurred that the accused was inadequately represented. I do not think, however, that this furnishes sufficient grounds for giving an accused, in all cases, a right to civil counsel, as such a provision in the law, may readily become the subject of great abuse. I do think, however, that in all cases where charged with offenses, the punishment for which may include death, life imprisonment, or dishonorable discharge from the Army, this privilege should be granted, as no man should be deprived of his citizenship without the most ample opportunity having been given him for his own defense.

Articles 62 and 64 in the proposed law are to me not consistent. In the first place, for a strictly military offense, such as disobedience of orders. I do not think that either the death penalty or life imprisonment should ever be possible in times of peace. In the second place, a military order given by a military superior is just as binding, and may be just as important, whether given by a commissioned or non-commissioned officer. I can see no reason, therefore, why in one case the maximum punishment should be death, and in the second place, six months.

In general, I think that the tendency of all amendatory laws should be to definitely and positively fix a status of a court-martial as a congressional agency; make it truly a court of law in which the rules of evidence, nature of offenses, the offenses themselves, and the punishing power of the court, in each case, be made as definite as possible. right of review (and by the term of "review" I do not mean General Crowder's interpretation) should be definitely fixed along some such lines as that provided for in all the bill. I do not think, however, that it would be feasible for the accused to state his desire for a review before the court, as it can very readily happen that a court has been dissolved by the time the court sentence had been approved by the reviewing authority, and, of course, an accused would have no reason for wanting a review until the sentence was determined.

In conclusion, I would say that I hope to send you to-morrow a copy of Collier's Magazine containing an article by myself on this subject, which fully expresses my view.

Very respectfully, yours,

J. B. W. GARDINER.

(Thereupon, at 5.10 o'clock p. m., the committee adjourned, subject to the call of the chairman.)